

EXTRAORDINARY MEASURES IN EXTRAORDINARY TIMES: LEGAL RESPONSE TO THE COVID-19 CRISIS IN BOSNIA AND HERZEGOVINA

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Abstract The COVID-19 pandemic has profoundly affected all aspects of people's daily lives. In response to the pandemic, many countries declared a state of emergency. Extraordinary measures have been implemented to reduce the spread of the new coronavirus. Some of these measures require significant restrictions of fundamental rights and freedoms, such as the right to privacy, freedom of movement, freedom of assembly, freedom of expression, religious freedoms etc. In Bosnia and Herzegovina (BiH), the BiH and entity authorities adopted decisions to provide a legal basis for implementation of extraordinary measures. The paper deals with the restrictive measures implemented during the COVID-19 crisis in BiH and their impact on human rights realization. The relevant decisions of the Constitutional Court of BiH are also analysed, including the decision in case AP-3683/20 according to which certain restrictive measures are contrary to the right to respect of private life and the freedom of movement.

Keywords
coronavirus
pandemic,
state of
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emergency
situation,
legal
framework,
human
rights

1 Introduction

On 11 March 2020, the World Health Organization (WHO) declared the coronavirus (COVID-19) outbreak a global pandemic (Canestrini, 2020: 116; fn 3). The COVID-19 pandemic has had a profound influence on all aspects of people's daily lives. Some authors compare the suddenness, severity, and range of the pandemic's consequences to a comet impact (Peisah et al., 2020: 1999). State and subnational authorities across the globe have faced the challenge of finding an appropriate legal response to the effects of the COVID-19 pandemic. Many governments opted to declare a state of emergency, or other forms of emergency regimes prescribed by national constitutional or statutory provisions.¹ Such governmental reactions could be expected given the scope of the COVID-19 pandemic, rightfully described as “the greatest global health emergency of the 21st century” (Thomson & Ip, 2020: 32). As Greene (2020b: 8) pointed out, “in recent decades this is the closest we have come to an ‘ideal’ state of emergency – a perfect storm that legal states of emergency were designed to confront.”

A state of emergency² implies the implementation of measures that limit, often profoundly, the exercise of basic human rights and freedoms. Emergency measures “pose the most significant challenges to the safeguarding of fundamental rights and civil liberties” (Canestrini, 2020: 116). By altering the balance between the branches of government (separation of powers) characteristic of normal circumstances, a state of emergency carries the risk of eroding the rule of law and democratic institutions. As Lührmann and Rooney (2020: 1) warn, states of emergencies grant “chief executives the power to bypass democratic constraints in order to combat existential threats”, and therefore are “ideal tools to erode democratic institutions while maintaining the illusion of constitutional legitimacy.” Declaring a state of emergency may lead to the strengthening of authoritarian tendencies, especially if an emergency regime is unjustifiably prolonged. For that reason, as emphasized by the Council of Europe's (CoE) Venice Commission, establishing strict limits on the duration, circumstances and scope of emergency powers is essential (European Commission for Democracy through Law (Venice Commission, 2020: 4). The experiences of

¹ According to the Geneva based Centre for Civil and Political Rights (data from May 25, 2020), 89 of 188 states declared a state of emergency (Bieber, 2020: 15).

² A state of emergency can be defined as „a - temporary - situation in which exceptional powers are granted to the executive and exceptional rules apply in response to and with a view to overcoming an extraordinary situation posing a fundamental threat to a country” (Alivizatos et al., 2020: 3).

introducing a state of emergency due to the COVID-19 outbreak in a range of countries have shown that these warnings are justified.³ The importance of instituting the appropriate control mechanisms that constrain bodies entrusted with emergency powers has once again been reaffirmed.

According to Sajó & Uitz (2017: 424), the constitutional allocation of emergency powers may significantly contribute to the prevention of their abuses during an emergency regime. The authors claim that the critical points for a constitutional regulation of emergency powers are: a) providing a constitutional definition of what constitutes an emergency situation (defining the reasons for declaring a state of emergency), 2) defining the procedure for declaring an emergency regime, 3) defining not only the particular measures which may be taken and but also those which are prohibited during an emergency situation, 4) delineating both the length of an emergency regime and the conditions for its extension, and 5) specifying the follow-up procedures to review and end emergency measures (Sajó & Uitz, 2017: 424-425). Today, approximately 90 percent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency (Bjørnskov & Voigt, 2018: 101). However, constitutional provisions often fail to regulate all the above-mentioned issues.

The emergency measures implemented to prevent the spread of COVID-19-imposed restrictions on a wide range of human rights, including limitations on the right to privacy, freedom of movement, freedom of assembly, freedom of expression, religious freedoms etc. Many states have drafted new data protection laws or relaxed existing laws to monitor more efficiently citizens' compliance with social distancing measures and to facilitate disease surveillance (Sekalala et al., 2020: 2). Various limitations on freedom of movement were also imposed. Different forms of curfew were introduced in a range of countries, including France, Italy, Spain, Belgium, United Kingdom, etc. (Sandor, 2020: 396). The majority of countries introduced strict quarantine measures for persons entering their territories and many states completely closed their borders for non-nationals.⁴ Some countries, such as Venezuela, asked their own nationals abroad not to return (Brumat & Finn, 2021:

³ Some authors warned of "alarming regressions toward authoritarian governance" due to emergency measures (Thomson & Ip, 2020: 2).

⁴ According to COVID Border Accountability Project's database, 189 countries introduced a complete border closure in response to the COVID-19 pandemic, at some point last year (the first country to isolate itself from the world was North Korea, on Jan. 22, 2020; the last was Bahrain, on June 4, 2020) (Shiraeef, 2021).

329). A ban on movement outside the municipality of permanent or temporary residence was introduced in a range of countries.⁵ Emergency measures also affected the exercise of religious freedoms. In some countries, religious services and ceremonies were temporary prohibited immediately after the COVID-19 outbreak.⁶ Since then, religious practices in a majority of countries have been adapted to the anti-pandemic measures. The list of restrictions of basic human rights due to the COVID-19 pandemic is lengthy and the above-mentioned examples are by no means exhaustive (restrictive measures implemented in Bosnia and Herzegovina (BiH) are discussed in the following sections).

According to Alivizatos et al. (2020: 9), there are three main instruments that human rights law uses to accommodate emergency situations. The first instrument is an exception to human rights, which exclude from the scope of human rights certain actions taken during a state of emergency. The second instrument is a limitation to non-absolute human rights, such as the right to freedom of expression, the right to freedom of association or the right to private and family life. The third instrument is derogation, which consists of a temporary suspension of certain human rights guarantees (Alivizatos et al., 2020: 9).

Several major human rights treaties contain derogation clauses. Examples of this kind of provision are Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR) and Article 27 of the American Convention on Human Rights (ACHR). Article 15 of the ECHR, entitled “Derogation in time of emergency”, sets out three preconditions a derogation must meet to be valid. First, a derogation is permitted only in time of war or other public emergency threatening the life of the nation. Second, a derogation must go no further than is required by the exigencies of the situation, and third, it must not be inconsistent with other obligations arising under international law (El Ziedy, 2003: 282-283). According to the case law of the

⁵ In Slovenia, from March 30 to April 30, 2020, a restriction of movement beyond the municipality, which a person had declared as his/her official residence, was enforced and movement between municipalities was banned (Kamin et al., 2021: 204).

⁶ In Greece, a ministerial decision was issued on 16 March, 2020, which established the temporary prohibition of exercising all kinds of religious services in all places of worship as a precautionary measure of public health for the period of time from 16 to 30 March (Androutsopoulos, 2021: 2). In the German federal state of Bavaria, public worship services were initially banned for seven weeks. This measure was in force until 3 May, 2020. On 4 May, the third Infection Control Regulation came into force, which contained a notable relaxation regarding religious assemblies (Berkmann, 2020: 184).

European Court of Human Rights (ECtHR), a public emergency threatening the life of the nation should be understood as „an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed” (*Lawless v Ireland*, 1961). Article 15.2 of the ECHR prohibits any derogation in respect of the right to life, except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude and the principle *nulla poena sine lege* (non-derogable rights). Additionally, Paragraph 3 of Article 15 of the ECHR requires notification to the Secretary General of the CoE of all measures taken under the derogation clause and as well as the reasons therefore. After the COVID-19 outbreak, Latvia, Romania, Armenia, Estonia, Moldova, Georgia, Albania, North Macedonia, Serbia, and San Marino notified the CoE Secretary General that they were invoking this provision to fight the ongoing pandemics (Lebret, 2020: 3). There is no agreement regarding the appropriateness of derogating from the ECHR in response to the Covid-19 pandemic. According to Greene, derogating from the ECHR using Article 15 “can actually enhance rather than diminish human rights protections” (Greene, 2020a: 5). Declaring a state of emergency under Article 15 of the ECHR, and expressly acknowledging the disagreeable and temporary nature of these measures, ensures that other states and international human rights organisations can monitor how these powers are being implemented. As Greene warns, “emergency powers have strange, unpredictable after-lives”; thus, “their impact should be as clearly defined and limited as possible” (Greene, 2020a: 4). Other authors, such as Dzehtsiarou, claim that “Article 15 derogations are not particularly useful and they send an unnecessary message to people that states will start limiting their human rights” (2020: 53-54).

During the COVID-19 pandemic, BiH did not derogate from the ECHR (which means that emergency measures limiting human rights and freedoms had to meet the conditions prescribed by Articles 8-11 of the ECHR).⁷

⁷ Articles 8-11 of the ECHR allow limitations for the protection of health and public order even without any emergency; however, these limitations need to be legal and proportionate (Dzehtsiarou, 2020: 54).

2 The Legal Response to COVID-19 in BiH

The first two COVID-19 cases in Bosnia and Herzegovina were detected on 5 March 2020, in Banja Luka, Republic Srpska (RS). The cases involved a 35-year-old male returning from Italy and his 14-year-old son (Hukic et al., 2020: 111). On 21 March 2020, the first death caused by COVID-19 occurred in BiH. The patient was a 76-year-old woman without a travel history hospitalized for COVID-19 two days earlier in Bihać, Federation of BiH (FBiH) (Hukic et al., 2020: 111). As of 20 July 2021, there were 205,340 confirmed coronavirus cases in BiH, of which 64,390 were in RS, 134,246 in FBiH and 6,704 in Brčko District (BD).⁸

BiH's legal response to the COVID-19 outbreak was delimited by its complex state structure. BiH, as a complex state community, consists of two entities: RS and FBiH (FBiH consists of 10 federal units – cantons). The BD is a third territorial unit that enjoys broad legislative autonomy. The establishment of emergency regimes is regulated differently depending upon the levels of government. For that reason, the various authorities (i.e., entity, BiH, cantonal, and local) adopted different emergency measures). We will first analyse the legal framework for establishing an emergency regime at different levels of government.

2.1 Emergency Regime in RS During the COVID-19 Pandemic

According to RS regulations, there are two kinds of emergency regimes: emergency situation and a state of emergency. RS first declared an emergency situation on 16 March 2020 (RS Government Decision of 16 March 2020). An emergency situation is a statutory category, regulated by the RS Law on Protection and Rescue in Emergency Situations. According to Article 5 of the Law, an emergency situation is “a situation in which the risks and threats or consequences of disasters, emergencies and other hazards to the population, environment and material goods are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by the ordinary action of the competent authorities and services, so for the mitigation and elimination of the same it is necessary to use other measures, powers and resources with an enhanced regime of activities.” The RS Government, upon the proposal of the Republic Headquarters for Emergency Situations (RHES),

⁸ <http://mcp.gov.ba/publication/read/epidemioloska-slika-novo?pageId=3>

declares an emergency situation for the whole territory of RS, or a part of its territory (Law on Protection and Rescue in Emergency Situations, 2012, Article 41.2). In March 2020, an emergency situation was declared for the entire territory of RS. Because the epidemiological situation worsened, a state of emergency was declared on 28 March 2020.

The introduction of a state of emergency in RS is regulated by the RS Constitution. According to Amendment CVII to the RS Constitution (which replaced Article 70 Paragraph 3 of the Constitution), the RS National Assembly, in accordance with the Constitution and the law, may declare a state of emergency for the Republic or part of the Republic in the event of a threat to public safety caused by a natural disaster (flood, earthquake, fire), epidemic, violation of human rights and freedoms, or obstruction of normal functioning of constitutional bodies of the Republic.

During a state of emergency, the RS President is given additional (legislative) powers. According to Article 81 Paragraph 1 of the RS Constitution: “In a state of war or emergency declared by the institutions of Bosnia and Herzegovina, and if the National Assembly is unable to convene, the President of the Republic, upon the proposal of the Government or on his or her own initiative, having consulted the President of the National Assembly, shall issue decrees with the force of law regarding matters in the jurisdiction of the National Assembly, and shall appoint and recall those officials who are normally appointed and recalled by the National Assembly.” The President of RS shall submit these decrees and decisions to be voted upon by the National Assembly as soon as it is able to convene. Article 81 Paragraph 3 of the Constitution provides for derogations from human freedoms and rights in a state of emergency, except for the freedoms and rights provided in Articles 10, 11, 13, 14, 15, 17, 18, 19, 20, 24 and 25 of the Constitution (non-derogable rights).

The Decision on the Abolition of the State of Emergency for the Territory of RS was passed by the RS National Assembly on 21 May 2020. The RS President passed 19 decrees with legal force during the state of emergency.

2.2 The State of Disaster in FBiH

The Government of FBiH adopted the Decision on Declaring the State of Disaster Caused by COVID-19 on the Territory of FBiH on 16 March 2020.⁹ The Decision was adopted on the basis of Article 24 of the Law on the Protection and Rescue of People and Material Goods from Natural and Other Disasters of FBiH. Following the declaration of a state of disaster, the Federal Civil Protection Headquarters (FCPH) was tasked with the adoption of measures to protect the population from the COVID-19 pandemic at the entity level. The state of disaster in FBiH ended on 29 May 2020.

The cantonal governments also adopted decisions on declaring a state of natural disaster. The Government of the Sarajevo Canton (SC), for example, adopted the Decision Declaring the State of Natural and Other Disaster Caused by Coronavirus (COVID-19) on the Territory of SC on 18 March 2020, ordering cantonal authorities and organizations, as well as municipal civil protection headquarters, to make their resources available to the Cantonal Civil Protection Headquarters of SC.

2.3 BD: A State of Natural Disaster

According to Article 19 of the Law on Protection and Rescue of People and Material Goods from Natural and Other Disasters in the BD of BiH, the Mayor of BD is responsible for declaring a state of natural and other disaster in the District. According to the Law, a state of natural or other disaster is “a state in which the risks, threats or consequences of any natural or technical-technological event for the population, the environment and material goods to the population, environment and material goods are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by the ordinary action of the competent authorities and services, so for the mitigation and elimination of the same it is necessary to use other measures, powers and resources with an enhanced regime of activities” (Law on Protection and Rescue of People and Material Goods from Natural and Other Disasters in the BD of BiH, 2016, Article 2). The Decision on

⁹ According to Article 9 (Sub-chapter IV.B) of the Constitution of FBiH, the FBiH government is authorized to adopt decrees with the force of law in response to national emergencies when the legislature is unable to do so. Such decrees may not derogate from the human rights and freedoms provided in the Constitution, and each decree shall terminate no later than the end of the thirtieth day after its promulgation. During the COVID-19 outbreak, the FBiH government did not pass decrees with the force of law, on the basis of these constitutional provisions.

Declaring a State of Natural Disaster Due to COVID-19 (Coronavirus) was adopted on 13 March 2020.

2.4 BiH: Declaration of a State of Natural Disaster

The Constitution of BiH does not contain a provision which allows a state of emergency to be declared at the national level. However, the Council of Ministers of BiH has declared a state of natural disaster on the territory of BiH. A state of natural disaster is a statutory category, regulated by the Framework Law on Protection and Rescue of People and Material Goods from Natural or other Disasters in BiH (Article 17d). The Council of Ministers of BiH adopted the Decision on Declaring the State of Natural or Other Disaster on the Territory of BiH on 17 March 2020 (Council of Ministers Decision of 17 March 2020). The Coordination Body of BiH for Protection and Rescue was formed on 30 March 2020, as an expert operational body that coordinates prevention and preparedness measures and implementation of protection and rescue measures in case of natural or other disasters in BiH. The Coordination Body also receives donations and renders international assistance in the field of protection and rescue (Framework Law on Protection and Rescue of People and Material Goods from Natural or Other Disasters in Bosnia and Herzegovina, 2008, Article 17). This body includes 21 members (nine from the Council of Ministers, five from FBiH, five from RS and two from BD).

3 Human Rights Limitations in BiH During the COVID-19 Pandemic

A series of strict measures were adopted by responsible authorities in order to contain the spread of the COVID-19 pandemic in BiH. Many of the measures implemented during the COVID-19 emergency regime severely limited the realization of basic human rights and freedoms. The following text briefly describes some of these restrictions.

3.1 Right to Privacy

Some of the emergency measures implemented during the COVID-19 pandemic in BiH infringed on citizens' right to privacy. According to the BiH Law on Protection of Personal Data, health data belongs to special categories of data protected by the Law (Law on Protection of Personal Data, 2006, Article 3). The orders of crisis

headquarters at different government levels required the public disclosure of the personal data of persons who violated the measure of mandatory isolation (a person's name and surname, father's name, and place of residence were disclosed). This measure was justified by invoking the need to protect the health of other citizens. However, certain crisis headquarters ordered the publication of personal data of all persons who were diagnosed with COVID-19 and subjected to mandatory isolation or self-isolation, including the persons who complied with the isolation measures.¹⁰ With its decision from 24 March 2020, the BiH Personal Data Protection Agency banned the disclosure of such personal data and ordered the removal of all previously published information (Agency Decision of 24 March 2020). The Agency also declared that the practice of the BiH Ministry of Foreign Affairs to distribute data on COVID-19-positive employees, or those employees subjected to isolation, within its internal e-mail network was unacceptable (Agency opinion of 11 December 2020).

3.2 Freedom of Movement

As a part of the COVID-19 emergency measures in March 2020, the entity authorities imposed a 24-hour blanket ban on movement for people aged 65 and older. In FBiH, a mandatory home confinement was also imposed for persons younger than 18. In RS, a daily curfew for the whole population was introduced on 21 March 2020 (the curfew hours were from 8pm-5am).¹¹ In FBiH, the implementation of a daily curfew began on 21 March 2020, from 6pm-5am (FCPH Order no. 12-40-6-148-36-20 of 21 March 2020). A ban on movement outside the place of residence was also introduced. In RS, as of 3 April 2020, citizens were requested not to leave their place of residence during the weekends (Saturday 12am – Sunday 6pm).¹² In FBiH, the restriction of movement outside the place of residence was introduced on 9 April in some of FBiH cantons (for example in Herzegovina-Neretva Canton).¹³

¹⁰ For example, the Cantonal Civil Protection Headquarters of the Herzeg-Bosnia Canton (HBC) ordered the public disclosure of the identity of all persons on the territory of HBC to whom decisions on mandatory home isolation were issued.

(<https://hms.ba/objavljen-popis-osoba-s-izdanim-rjesenjima-o-zdravstvenom-nadzoru-i-kucnoj-izolaciji/>)

¹¹ <https://mup.vladars.net/lat/index.php?vijest=23061&vrsta=novosti>

¹² https://www.glassrpske.com/lat/novosti/vijesti_dana/gradjanima-srpske-zabranjeno-napustanje-mjesta-prebivalista-tokom-vikenda/311835

¹³ <https://vijesti.hrt.hr/svijet/bih-vlasti-u-hnz-uvode-zabranu-kretanja-izmedu-opcina-843984>

On 22 April 2020, the Constitutional Court of BiH declared unconstitutional the ban on movement for minors and persons older than 65 on the territory of FBiH. The Court concluded “that the appellants’ freedom of movement under Article II(3)(m) of the Constitution of BiH and Article 2 of Protocol No. 4 to the European Convention has been violated because there is no proportionality or fair balance between the measures ordered by the impugned Order and public interest in the protection of public health” (Decision in case no. AP 1217/20). The Court gave the FBiH Government and FCPH five days from receiving the decision to harmonize the challenged order with the BiH constitution and the ECHR.

3.3 Freedom of Assembly

Restrictions on freedom of assembly during the COVID-19 outbreak in BiH took different forms (for example a total ban on gatherings, a ban on gatherings in groups larger than the allowed number of people, a prohibition of public gatherings and events). Only a few examples will be mentioned here. In RS, on 30 March 2020, RHES adopted the Conclusion on the Mandatory Implementation of Measures to Respond to the Emergence of Disease Caused by the New Coronavirus (COVID-19) in RS prohibiting all forms of public gatherings (RHES Conclusion no. 11-2/20). On 10 April 2020, RHES adopted Conclusion no. 19-3/20 prohibiting all citizens from gathering in groups larger than three persons in a public place (RHES Conclusion of 10 April 2020). In FBiH, FHCP adopted Order no. 12-40-6-149-9/20 on 17 March 2020, which banned all public gatherings in this entity. On 29 April 2020, FHCP issued Order no. 12-40-6-148-155/20 prohibiting gatherings in groups larger than five persons on the territory of FBiH. Cantonal headquarters adopted similar prohibitions (FHCP Order of 29 April 2020).

3.4 Freedom of Expression

Fake news, misinformation, and conspiracy theories have become prevalent in the age of social media (The Lancet Infectious Diseases, 2020: 875). Widespread sharing of inaccurate or unverified information becomes particularly dangerous during pandemics, where its consequences can be particularly severe (even fatal). As Tedros Adhanom Ghebreyesus, the WHO’s director-general, warned in his speech at the Munich Security Conference: “We’re not just fighting an epidemic; we’re fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as

dangerous.”¹⁴ On the other hand, there is a risk that authorities will use these warnings as a pretext to restrict individual rights, thus silencing opposing voices.

On 19 March 2020, upon the proposal of RHES, the RS Government passed a Decision on the Prohibition of Causing Panic and Riots During an Emergency Situation Declared on the Territory of RS (RS Government Decision of 19 March 2020, 2020). The decision established that: “During the emergency situation ... it is prohibited to present or transmit false news or allegations that cause panic or seriously disturb public order or peace or prevent or significantly impede the implementation of decisions and measures of state bodies and organizations that exercise public authority” (Article 2.1). The ban also applied to information placed through the media, social networks, or other similar media (Article 2.2). After the declaration of the state of emergency, on 6 April 2020, the RS President passed a Decree with Legal Force Prohibiting Causing Panic and Riots During a State of Emergency, with the same provisions (the Decree entered into force on April 7). A fine was prescribed for the misdemeanour offenses prescribed by the Decree (for natural persons from 1,000 to 3,000 convertible marks (BAM), for juridical persons from 3,000 to 9,000 BAM, and for responsible persons in a juridical person from 1,000 to 3,000 BAM). The Decree was repealed on 16 April 2020, and all charges against perpetrators were dropped.

On 21 March 2020, the BD Protection and Rescue Headquarters issued the Order Prohibiting the Public Disclosure and Dissemination of False Information Regarding the Coronavirus. Article 1 of the Order stipulated: “All representatives and employees of public institutions of the BD of BiH, as well as all citizens of the BD of BiH, are prohibited from publicly presenting and transmitting false news and information related to the coronavirus epidemic, and which may cause fear and panic among the population or otherwise negatively affect the implementation of measures to protect the population from the epidemic.”

On 10 April 2020, the Civil Protection Headquarters of the Municipality of Stari Grad in Sarajevo adopted an Order Prohibiting the Violation of Public Order and Peace by Causing Panic and Disorder in the Area of this Municipality. The Order never came into force.¹⁵

¹⁴ <https://www.who.int/director-general/speeches/detail/munich-security-conference>

¹⁵ <https://detektor.ba/2020/05/05/opcina-stari-grad-odustala-od-kaznjavanja-gradjana-za-sirenje-laznih-vijesti/>

3.5 Religious Freedoms

The ban on mass gatherings and implementation of social-distancing measures inevitably led to restrictions on religious communities to worship or conduct religious ceremonies. According to Begovic (2020: 232), two somewhat different regulatory approaches can be noticed in the COVID-19 measures of the two BiH entities regarding the imposition of restrictions on religious groups. In FBiH, no specific regulations were adopted on restricting religious events and practices. Religious freedoms were affected by general regulations, such as FHCP orders restraining freedom of movement and assembly (the suspension of all public gatherings, a curfew etc.). In RS, in addition to general regulations restricting freedom of assembly and of movement, specific religion-related measures were also adopted (formulated as recommendations). RHES Conclusion on Restriction of Assembly in Places of Worship of 21 March 2020 recommended “to the authorities of recognized churches and religious communities to adjust their rituals and other worship services in accordance with the measures to prevent the spread of the new coronavirus” (Begovic, 2020: 233). Another specific regulation imposing a restriction on freedom of religion was the RHES prohibition of movement on Easter, between Friday, 17 April at 3pm and Saturday, 18 April at 5am, and from Saturday, 18 April at 3pm to Monday, 20 April at 5am (Begovic, 2020: 233).

4 Constitutional Courts’ Review of Emergency Measures

The role of the constitutional judiciary is particularly relevant during the implementation of measures restricting human rights and freedoms. Although the constitutional courts in BiH continued to operate throughout the emergency period, most of their decisions were delayed and limited in scope. This, however, is not unique to BiH. As Sajó & Uitz (2017: 432) warn, “Contemporaneous judicial review of the declaration of emergency is a possibility in some countries, especially as far as the derogation from human rights is concerned, but experience shows that this is understandably extremely deferential. Judicial review after the lifting of emergency primarily has educational benefits: it sets the standards for future events.”

After the COVID-19 outbreak, the BiH Constitutional Court was petitioned with complaints seeking review of the emergency measures limiting the freedom of movement and other human rights and freedoms. As already mentioned, the Constitutional Court ruled on 22 April 2020 that banning minors and people over 65 from leaving their homes breaches their right to freedom of movement. The Constitutional Court reasoned that the challenged measures do not satisfy the requirement of proportionality under Article 2 of Protocol No. 4 to the ECHR, because they do not specify the basis for the assessment of FHCP that the groups concerned have a higher risk of contracting or transmitting COVID-19 virus. Furthermore, no consideration was given to the introduction of more lenient measures; the measures were not strictly limited in time; and, there was no obligation for the measures to be reviewed regularly. The Court also called for a stricter supervision by the FBiH Government over the FHCP functioning in order to minimize any restrictions of constitutional rights. The Court emphasized the obligation of the FBiH Government, as well as other competent bodies, to publicly explain, on a daily basis, with the participation of the eminent health professionals, the necessity of all adopted measures, their duration and their possible moderating or tightening. The Court, however, rejected the request in the appeal to abolish the challenged order and stopped short of outright annulling the measure (Decision in case no. AP 1217/20, 2020).

On 22 December 2020, the BiH Constitutional Court declared unconstitutional two measures imposed in the efforts to suppress the spread of the COVID-19 virus, namely the mandatory use of face masks in the SC and the general restriction of movement in the FBiH. The Court found that the challenged measures violated the right to private life and the freedom of movement under the BiH Constitution, the ECHR, and Protocol No. 4 to the ECHR (in the Court's opinion, the measures did not satisfy the "democratic necessity test"). However, it stopped short of abolishing the contested measures. The Court concluded that the part of the appeals requesting the revocation of the disputed orders was unfounded, because such revocation, given the undoubted public interest in introducing the necessary measures to protect the population from a pandemic, could have negative consequences before the legislative and executive bodies could take measures within the scope of their powers and obligations. The Court ordered the Parliament and the Government of FBiH to take action and bring their conduct in to compliance with human rights standards

and to report to the Court about the compliance with this order (Decision in case no. AP 3683/20).

The RS Constitutional Court assessed the constitutionality of the establishment of an emergency regime and certain emergency measures implemented in RS. The Court concluded that the state of emergency in RS was declared in accordance with the RS Constitution (Decision in case no. U-24/20). On the other hand, the Court ruled on 29 April 2021 that the RHES Conclusion on Restriction and Prohibition of Movement on the Territory of RS no. 16-3/20 of 6 April 2020 was not in accordance with the RS Constitution, the Law on Protection and Rescue in Emergency Situations and the Law on Protection of the Population from Infectious Diseases, since RHES exceeded its legal authority (Decision in case no. U-25/20).

5 Conclusion

The emergency measures taken in response to the COVID-19 pandemic “have been among the most restrictive in contemporary history, and have raised concerns from the perspective of democracy, human rights, and the rule of law” (Grogan, 2020: 338). Although implementation of restrictive measures during a pandemic can be considered legitimate, the risk of potential abuses is very high. Therefore, it is important that appropriate control mechanisms are established during an emergency regime, in order to avoid the abuses of emergency powers by the responsible authorities. Constitutionalizing an institute of state of emergency (and constitutionally defining safeguards to prevent the abuses) certainly mitigate the risk of government abuses.

An analysis of the emergency measures implemented in BiH during the COVID-19 pandemic showed no significant abuses of the emergency powers by the authorities. Some of the controversial measures, such as punishing those responsible for the dissemination of unverified information or publishing data on the infected persons, were abolished relatively quickly and were mostly not applied. Although different level authorities in BiH have shown relative efficiency in taking measures to combat the COVID-19 pandemic, they have also shown certain level of confusion, which could have resulted in more serious human rights violations. Moving forward, it would be justified to amend constitutional and legal provisions regulating the establishment of an emergency regime at the various levels of government, in order

to strengthen control mechanisms and prevent possible abuses of emergency powers.

Legislation, Acts, Regulations and Court Decisions

- Conclusion no. 11-2/20 on the Mandatory Implementation of Measures to Respond to the Emergence of Disease Caused by the New Coronavirus (COVID-19) in RS. Republic Headquarters for Emergency Situations of RS (2020).
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